IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY, DR. P. PHILLIPS COOPERATIVE, PLAINTIFFS,

THE CITY OF NEW YORK, THE PORT OF NEW YORK AUTHORITY, CALIFORNIA CITRUS LEAGUE, CALIFORNIA GRAPE AND TREE FRUIT LEAGUE, PHILADELPHIA TERMINALS MARKETING ASSOCIATION, THE AUCTION RECEIVERS OF PHILADELPHIA, DAN STOREY JR., MAX FELDBAUM AND SONS, A. CANCELMO COMPANY, B. M. YOUNG, NEW YORK FRUIT AUCTION CORPORATION, UNITED FRUIT BUYERS' ASSOCIATION, INC., UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, IDAHO SHIPPERS ASSOCIATION, INC., NATIONAL ONION ASSOCIATION, WESTERN GROWERS ASSOCIATION, AND THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFFS,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

THE BALTIMORE & OHIO RAILROAD COMPANY, ERIE RAILROAD, THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND READING COMPANY, INTERVENING DEFENDANTS

STATEMENT OF THE SECRETARY OF AGRICULTURE AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the appellant Secretary of Agriculture (an inter-

vening plaintiff in the case) submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the District Court of three judges entered in this cause.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Florida, Orlando Division, has not yet been reported. A copy of the opinion and final judgment are attached hereto as Appendix A.

JURISDICTION

This proceeding was instituted to enjoin and set aside certain orders of the Interstate Commerce Commission, and in accordance with the requirement in 28 U.S.C. Supp. V § 2325 the cause was heard by a District Court of three judges. The Court below entered its order on August 31, 1953, denying the application to set aside, and to enjoin the enforcement of, the Commissioner's orders. A petition for appeal is presented to the District Court herewith, to wit, on October , 1953. The jurisdiction of the Supreme Court to review this order and judgment by direct appeal is invoked under 28 U.S.C. Supp. V §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *American Trucking Assns.* v. *United States,* 326 U.S. 77; *Alabama G.S.R. Co.* v. *United States,* 340 U.S. 216; *American Trucking Assns.* v. *United States,* 344 U.S. 298.

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The right of the Secretary of Agriculture to appeal from the judgment of the District Court is conferred by § 201(b) of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U.S.C. § 1291(b)); § 203(j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088-1089, 7 U.S.C. § 1622(j)); and 28 U.S.C. Supp. V § 2323. It is provided, *inter alia*, in § 201(b) of the Agricultural Adjustment Act of 1938 that in cases with respect to rates, charges, tariffs, and practices relating to the transportation of farm products where the Secretary is a party before the Interstate Commerce Commission he shall have "the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (7 U.S.C. § 1291(b)).

QUESTIONS PRESENTED

The line-haul freight rate established by railroad carriers in the United States (*i.e.*, the published freight rate between cities) includes delivery of the freight to the consignee. Delivery is generally effected by placing the freight in the car on a team-track at a location accessible to the consignee. However, the team-track facilities at New York are adequate to handle only a small part of the great bulk of fruits and vegetables received at New York, and because of the topography the carriers move the cars by means of car floats across the Hudson River from Jersey City, New Jersey, to the piers at New York, and the unloading of the cars is performed by the carriers. The shippers

are not permitted access to the cars. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. This method of making delivery of freight at New York is the method most economical to the carriers, and no charge for such delivery, other than the line-haul rate, has been made for over fifty years prior to the action challenged in this case. The unloading of fruits and vegetables has also been performed by the carriers at certain locations in Philadelphia, Pennsylvania, and the shipper is not permitted access to the cars at these tracks. Delivery to the consignee is not effected until after the cars are unloaded. No charge for such delivery at Philadelphia, other than the line-haul rate, has been made for over fifty years prior to the action challenged in this case. At the hearing before the Interstate Commerce Commission to determine the validity of proposed unloading charges at New York and Philadelphia, no evidence was introduced to show that the carriers are not adequately compensated for the delivery of fruits and vegetables at New York and Philadelphia by their line-haul rates. The Commission did not determine whether the proposed aggregate charges, consisting of the line-haul rates plus the proposed unloading charges, are just and reasonable for the transportation of the fruits and vegetables. In these circumstances, the questions are:

(1) Whether the Commission has authority to approve charges by the appellee railroad carriers,

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for unloading fruits and vegetables at New York and Philadelphia, without determining whether the line-haul rates plus the unloading charges, *i.e.*, the entire charges for the transportation, including delivery, are just and reasonable.

(2) Whether an unloading charge on fruits and vegetables at New York is an unjust discrimination or an undue or unreasonable prejudice or disadvantage in violation of sections 2 and 3(1) of the Interstate Commerce Act inasmuch as no similar charge is imposed on any other freight unloaded by the carriers at New York, including other similar perishable products, *e.g.*, butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk.

(3) Whether the orders of the Commission, establishing identical unloading charges at New York and Philadelphia even though it is conceded that unloading costs at Philadelphia are substantially lower than at New York, are supported by substantial evidence and adequate findings.

(4) All other questions raised in the Assignment of Errors are also presented.

STATUTES INVOLVED

Sections 202 and 203(j) of the Agricultural Marketing Act of 1946 (7 U.S.C. §§ 1621, 1622 (j)); Section 201(a) and (b) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1291(a) and (b)); and Sections 1(3)(a), 1(5), 2, 3(1), 6(7), 15(6), 15(7), and 15 a(2) of the Interstate Commerce Act, as amended (49 U.S.C. §§ 1(3)(a), 2, 3(1), 6(7),

15(6), 15(7), 15a(2), and 49 U.S.C. Supp. V § 1(5)), and the National Transportation Policy preceding Section 1 of the Interstate Commerce Act, as amended, are set forth in Appendix B hereto.

STATEMENT

This action was instituted in the United States District Court for the Southern District of Florida, Orlando Division, by various shippers of fruits and vegetables against the Interstate Commerce Commission and the United States to enjoin and set aside certain orders of the Interstate Commerce Commission approving charges established by railroad carriers for unloading fruits and vegetables at New York and Philadelphia. The United States was made a defendant in accordance with the requirement in 28 U.S.C. Supp. V § 2322, but the United States remained neutral in the litigation.

The Port of New York Authority, the Secretary of Agriculture of the United States, and others intervened as plaintiffs and the railroad carriers involved intervened as defendants. The Secretary of Agriculture of the United States intervened in accordance with Section 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U.S.C. § 1291), which authorizes the Secretary to participate as a party in proceedings before the Interstate Commerce Commission with respect to "rates, charges, tariffs, and practices relating to the transportation of farm products * * * " (7 U.S.C. § 1291(a)), and in such cases "the Secretary shall have the rights of a party before the Commis-

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sion and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (7 U.S.C. § 1291(b)).

The unloading charges challenged in this proceeding were filed with the Commission to become effective on June 1, 1947, but the charges were suspended by the Commission's order of May 28, 1947, pending an investigation of the lawfulness of the charges. In its report dated October 4, 1948, the Commission, with Chairman Lee and Commissioners Aitchison, Splawn, and Alldredge dissenting, and Commissioner Patterson not participating, found the proposed unloading charges "just and reasonable". Thereafter the unloading charges, ranging from $1.95 to $2.60 per net ton became effective on November 1, 1948. These charges were 30% higher than the charges originally proposed as a result of a general increase in all railroad rates and charges authorized by the Commission. In December 1948 various petitions were filed with the Commission seeking to have the proceeding reopened and on June 9, 1949, the Commission reopened the proceeding for rehearing. After receiving additional evidence the two Hearing Examiners for the Commission issued their report recommending that the Commission "should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed" (Report on Rehearing Proposed by Russell M. Brown

and M. J. Walsh, Examiners, p. 21). Subsequently, the Commission issued a notice that the record "is deficient in respect of certain evidence which seems to be important, and the proceedings will be assigned for further hearing." Further evidence was received and the "Second Report on Further Hearing Proposed By M. J. Walsh, Examiner" was issued recommending that upon further hearing "the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of Section 3(1) of the act" (Report, p. 25).

The report of the Commission dated May 7, 1952, reversed the findings and conclusions by the Examiners and approved the unloading charges at New York and Philadelphia at reduced rates varying from $1.05 to $1.65 per net ton. On September 16, 1952, and on September 23, 1952, certain of the plaintiffs filed complaints with the Commission attacking the unloading charges at New York and Philadelphia, respectively, and on December 15, 1952, the Commission dismissed these complaints.

The District Court, with Judge DeVane dissenting, sustained the validity of the Commission's orders and the Court denied the relief prayed for in the complaints.

It is the position of the Secretary of Agriculture that the Commission's order of October 4, 1948, originally approving the unloading charges, the Commission's order of May 7, 1952, approving the

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unloading charges at a reduced rate, and the Commission's order of December 15, 1952, dismissing the complaints attacking the reduced unloading charges are invalid and should be set aside and enjoined.

The Secretary of Agriculture of the United States is interested in this proceeding as the representative of the agricultural community in the United States. The unloading charges will aggregate several million dollars each year, and will be borne to a large extent by the American farmers (R. 588-589, 593, 614, 636-637, 666, 675, 677, 685, 716, 1182-1184).[1] Even if the unloading charges can be partially shifted to the consumers (R. 614, 1065, 1067, 1181-1182, 1251-1253, 1310), the unloading charges will, nonetheless, widen the spread between the price received by the producer and the price paid by the consumer (R. 86, 1183-1184), which is contrary to the expressed purpose of Congress to provide for "an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and *the price spread between the producer and consumer may be narrowed* * * * " (7 U.S.C. § 1621; emphasis supplied).

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[1] The record references are to the pages of the transcript of testimony in the administrative proceeding (Investigation and Suspension Docket No. 5500), which is a part of the record in the District Court.

The New York area has received annually in recent years over 100,000 carloads of fruits and vegetables by rail (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 125). The team-track facilities at New York are adequate to handle only a small portion of this vast bulk of freight traffic, and "it would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York (*Id.* at 130). Instead of delivering the fruits and vegetables at team tracks, the carriers place the freight cars on car floats or lighters at Jersey City, New Jersey, and move the cars across the Hudson River by tugboats to the piers at New York.[2] The carriers then unload the cars, and the cars are immediaely returned empty to the New Jersey side and other car floats are placed at the piers for unloading. This method of unloading permits the carriers to use the same space for unloading two or three times during the same night (*Id.* at 124-125). "In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available" (*Id.* at 124). This method of making delivery of freight at New York is the method most

[2] The New York Central has the only all-rail line into Manhattan for the delivery of freight. This line has "limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 124).

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economical to the carriers,[3] and no charge for such delivery, other than the line-haul rate, has been made for over 50 years prior to the action challenged in this case. The shippers are not permitted access to the cars on the car floats and their trucks can come on to the pier floors only at specified times. "Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 272 I.C.C. 648, 654-655; 286 I.C.C. 119, 125). "When cars are unloaded at the pier terminals the owners of the produce must truck the contents of the cars from the pier floor to their destination in New York * * * " (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 272 I.C.C. 648, 655).

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[3] By delivering cars at the pier, the carriers avoid the expense of additional switching and detention of the cars and the great expense which would be incurred if the railroads were required to expand their team track facilities at New York (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 123, 126, 133). There is no switching charge in the event of delivery at team tracks, and there is no basis for the statement in the District Court's opinion that the Commission found that a switching charge is paid "by the consignee". The cars delivered at team tracks are moved across the Hudson River by car floats or lighters, but when the cars for team-track delivery reach Manhattan Island they are accorded additional switching and, after placement on the team track, the consignee has two days free time to unload the car. In these circumstances, unloading at the New York piers was "inaugurated by the carriers [during the latter part of the nineteenth century] for their own convenience and benefit", and this method of making delivery "is now and always has been the most economical way the carriers may make deliveries of freight at New York" (DeVane, District Judge, Dissenting).

The railroads have also historically unloaded fruits and vegetables at Philadelphia without any charge other than the line-haul rate. From 1927 until November 1, 1948, when the challenged unloading charges went into effect, approximately 95% of the fruits and vegetables consigned to Philadelphia, other than for chain stores, was handled at the Pennsylvania Produce Terminal at which the cars were unloaded without a separate charge by the railroad carriers. The shippers are not permitted access to the cars prior to the unloading at the Pennsylvania Produce Terminal and delivery is not made until the cars have been unloaded by the carrier. This method of making delivery releases the cars quickly and about 95% of the cars are, therefore, released almost immediately after arrival. This method of making delivery also affords the carriers an opportunity to repair damaged packages thereby reducing claims for damage (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 133-135).

The development of the wholesale marketing facilities for fruits and vegetables at New York and Philadelphia has been centered around the railroad facilities at these cities, and the marketing enterprise is dependent to a large degree on the continued maintenance of reasonable and adequate transportation by the rail carriers. The unloading charges attacked in this proceeding, if allowed to remain in effect, will substantially disrupt the marketing of agricultural products at New York and

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Philadelphia. For example, when the unloading charges became effective, consignees attempted to avoid the charges by taking delivery at outlying team-track stations and paying the cost of trucking the commodities into market or by shifting from rail to motor trucks for the entire transportation. In February, 1949, deliveries of fresh fruits and vegetables to the New York piers were about 50% less than in February 1948 (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 126.) Similar traffic to New York by truck and vessel increased substantially in February 1949 compared with February 1948. The Commission found that the "diversion of rail shipments from pier stations to other points intensified the problems of the New York produce market, resulting in greater congestion in terminal handling, and in dissatisfaction among buyers, labor, and other elements at that facility" (*Id.* at 126).

In addition, the City of New York was "planning to rehabilitate its piers at a cost of $78,000,000, but it is intimated that it may not proceed with that program" if the unloading charges remain in effect (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 129). The Port of New York Authority has also temporarily abandoned plans for the construction of a union water front terminal at a cost of $27,000,000, in substantially the same location as the pier terminals, because of the disruptive effects of the unloading charges involved in this case (*Id.* at 130).

"The New York water front contributes from 25 to 40 percent of the basic economy of that city" and the city officials are seriously concerned about the adverse effects which will result from a continuance of the challenged unloading charges (*Id.* at 129-130).

With respect to Philadelphia, there has been a trend since 1930 toward diversion from the railroads to the trucks of the fruit and vegetable traffic consigned to Philadelphia, and the unloading charges attacked in this case "will further divert the fruit and vegetable traffic from the [railroads] produce terminals" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 136). The unloading charges at Philadelphia are also causing some dealers to buy their produce at other cities and, as a result, the entire produce business at Philadelphia will suffer irreparable damage if the unloading charges remain in effect (*Id.* at 135-137).

THE QUESTIONS ARE SUBSTANTIAL

The issues in this case relate primarily to the authority of the Interstate Commerce Commission to impose charges on shippers for unloading fruits and vegetables at New York and Philadelphia without determining whether the total payment received by the railroads for such unloading is just and reasonable. In addition, the issue is presented as to whether the Commission can approve a charge for unloading fruits and vegetables when no similar charge is imposed for unloading other similar per-

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ishable agricultural commodities. These issues are of far-reaching importance to the agricultural economy of the United States, and the decision as to these issues will substantially influence the marketing of agricultural commodities shipped from all sections of the country to New York and Philadelphia.

The Commission concedes that for over 50 years the railroads have been compensated, either in whole or in part, for the unloading of fruits and vegetables at New York and Philadelphia by their line-haul rates. In its Report of May 7, 1952, the Commission states that (emphasis supplied) "[p]rior to November 1, 1948, when the charges under consideration became effective there were no *separate* charges *in addition to the through rates*, for unloading fruits, vegetables, or other descriptions of traffic at the stations specified" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 121). "At the [Philadelphia] piers unloading, similar to the present operations at New York piers, was performed by the carriers without charge therefor *other than the line-haul rate*. In fact, delivery could not be accomplished without first unloading the freight. In 1927, the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce terminals, either of which was then capable of accommodating the fruit trade at that point, and at both of which unloading *under the line-haul rate*, as previously performed at the piers, was continued" (*Id.* at 133-134). "This method of unloading had

been performed by the carriers prior to November 1, 1948, without charge therefor *other than the line-haul rate*" (*Id.* at 135). "The respondents have been willing to perform the unloading without a *separate* charge until, in recent years, the cost thereof substantially increased" (*Id.* at 139-140). These findings by the Commission inexpugnably prove that the railroads, prior to November 1, 1948, were compensated for unloading fruits and vegetables at New York and Philadelphia by their line-haul rates.

It is also significant that in prior proceedings involving the line-haul rates on fruits and vegetables to points in the United States, including New York and Philadelphia, the destination carriers "emphasized the magnitude of their terminal services and costs, including unloading by them of the traffic as an essential part of delivery * * * " (See Second Report on Further Hearing Proposed by M. J. Walsh, (Examiner, p. 25). The Commission found that "[v]arious rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 272 I.C.C. 648, 662).[4]

[4] There is no basis in the evidence or in the Commission's findings for any contention that the unloading was performed free by the carriers. An analogous situation is involved in the "Bank Night" motion picture cases where the theatres allegedly give "free" chances for a prize with the purchase of a movie ticket. It has been consistently held that the chance is not

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The Commission also recognized that the unloading performed at New York and Philadelphia is an integral part of the transportation involved and that such unloading merely effects delivery to the consignee. The Commission expressly found that "[d]elivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (272 I.C.C. 648, 654-655; see also 286 I.C.C. 119, 125, 129, 133-139). It is a fundamental principle in the transportation law of the United States that delivery is included under the line-haul rates. This principle has been consistently recognized by the Commission and the Courts. In *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I.C.C. 310, 314-315, the Commission held:

> "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery. * * * The railroads recognize their duty to

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"free", as a matter of law, and that the admission price includes payment for the chance. See *Affiliated Enterprises* v. *Gantz*, 86 F. 2d 597, 599 (C.A. 10); *City of Wink* v. *Griffith Amusement Co.*, 129 Tex. 40, 100 S.W. 2d 695, 699. In a similar case, *Taylor* v. *Smetten*, 11 L.R.S.C.J. 207, the English Court held that "[a]lthough it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices charged and obtained for the packages did not include the aggregate prices of the tea and the prizes". *Cf. Federal Trade Comm'n* v. *Education Society*, 302 U.S. 112; *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103 (C.A. 7).

make delivery under the flat rate stated in their tariffs, * * *."[5]

Similarly, in *United States v. Am. Tin Plate Co.*, 301 U. S. 402, 409, the Court stated:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver from in its freight depot or at team tracks or on siding or spur-tracks owned by an industry."

In *Atchison Ry. v. United States*, 295 U. S. 193, 200, involving the delivery of livestock at Chicago, this Court held that "[l]ong continued practice and special conditions made unloading at these yards a transportation service to be performed by the carrier" under the line-haul rates. See also, *Adams v. Mills*, 286 U. S. 397, 409-416; *United States v. U. S. Smelting Co.*, 339 U. S. 186, 189-190.

The principle that delivery is included under the line-haul rate was also recognized by the Commission in *Unloading Lumber at New York Harbor*, 256 I.C.C. 463, 468, in which it was held:

> "The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor . . . The nature and incidents of the unloading service

[5] This decision and order by the Commission was upheld in *Interstate Commerce Commission v. A., T. & S. F. Ry. Co.*, 234 U. S. 294.

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here considered establish beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61. As such a showing was not made respondents have not met the requirements of the statute in that respect and accordingly have not sustained their burden as to the reasonableness of the proposed charge."

The same issue was also presented in *Fruits and Vegetables to Duane St., N. Y.*, 66 I.C.C. 135, 139. In that proceeding the Erie Railroad had two proposals, the second of which was "to establish terminal charges on fruits and vegetables at its Duane Street station." Those terminal charges were intended to cover the two services of unloading and sorting and were to take the place of lower charges, previously in effect, which covered only the sorting service. In finding the proposed unloading and sorting charges not justified, the Commission held:

"The terminal charges present a somewhat different problem. It is proposed that they shall apply on all fruit and vegetable traffic delivered at Duane street station. As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane street under the line-haul rates. * * * The services for which the proposed terminal

charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic, merely pointing out that the rates on California fruit are blanketed to all territory east of the Colorado common points and that 15 years ago, when the traffic began to be handled in the manner above described, no corresponding increase was made in the through rates. This blanket has been voluntarily maintained by the carriers for many years and appears to have been satisfactory to all concerned. We find that the establishment of terminal charges higher than the present assorting charges has not been justified."

Commissioner Knudson, dissenting, in the Commission's report dated May 7, 1952, challenged in this proceeding, explains that (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia,* 286 I.C.C. 119, 144):

"In several reports the Commission found that charges for unloading freight at New York piers incident to delivery to the consignee were included in the line-haul rates; that "delivery to the consignee is not effected until the cars are unloaded and the lading placed at a convenient location on the pier floor"; and

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that where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation theretofore received for such through service. *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47; *Bills of Lading*, 52 I.C.C. 671; *Erie R. Co.* v. *Alabama & V. Ry. Co.*, 98 I.C.C. 268; *Fruits and Vegetables to Duane St., N. Y.*, 66 I.C.C. 135; *Allowances for Stacking*, 179 I.C.C. 780; *Unloading Lumber at New York Harbor*, 256 I.C.C. 463. These reports, supporting protestants' contention herein and specifically referred to in the examiners' proposed reports, are omitted from the report of the majority."

Although the Commission has suggested that, because of an increase in the cost of unloading, the carriers are no longer *adequately* compensated for the unloading in their line-haul rates,[6] the decisive

[6] The Commission stated in its report of October 4, 1948 (272 I.C.C. 648, 662), that "[*f*]*or the purposes of this proceeding* we are not convinced that *adequate* compensation for these unloading services is or should be included in the line-haul rates" (emphasis supplied). This statement is not supported by any evidence. No evidence was introduced as to the adequacy of the line-haul rates to compensate the carriers for the entire transportation of the agricultural commodities, including delivery. Also, there are no subsidiary findings by the Commission as to whether the line-haul rates adequately compensate the carriers for the transportation involved. See *Colorado-Wyoming Co.* v. *Comm'n*, 324 U. S. 626, 634; *Florida* v. *United States*, 282 U. S. 194, 215.

fact is that the line-haul rates prior to November 1, 1948, included payment for the unloading performed at New York and Philadelphia. It is, therefore, impossible to determine whether the proposed unloading charges are just and reasonable without determining the extent to which payment is being made for the unloading in the line-haul rates. No evidence was introduced to show that the railroads are not being adequately compensated in their line-haul rates for the entire transportation rendered, including delivery. Various rate increases have been granted in the line-haul rates from time to time and effective October 6, 1947, a 30% increase in all freight rates was approved by the Commission (286 I.C.C. 119, 120). But assuming, *arguendo,* that even with these increases the railroads are not being adequately compensated for the transportation rendered, the entire line-haul rate must be considered and the Commission must find that the entire charge proposed for the transportation, including delivery, consisting of the line-haul rate plus the proposed unloading charge, is just and reasonable. Otherwise the railroads will be receiving double payment for the service rendered. The extent, if any, to which the railroads are not at present being adequately compensated for the unloading under their line-haul rates—and, therefore, the extent to which an additional charge can now be imposed for the unloading—cannot be determined without considering the reasonableness of the entire line-haul rates.

The District Court, in sustaining the Commis-

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sion's orders, erroneously attributed to the Commission findings antithetical to the findings made by the Commission. The District Court stated that the Commission is really deciding "where the carrier's line-haul service ends, and whether unloading is a justifiable additional service * * *." The Court then stated that the Commission "found that unloading is an additional service, wholly distinct from delivery * * *." But, as shown above, this is directly contrary to the Commission's findings. The Commission found that "[d]elivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (272 I.C.C. 648, 654-655), and that the proposed charge, in addition to the line-haul rate, was "for making delivery at New York piers" (286 I.C.C. 119, 129).

Based upon this basic error, the District Court erroneously concluded that "the Commission found that the line-haul service terminated when the cars reached the pier station * * *." No such finding was made by the Commission. As shown above, the Commission recognized that for over 50 years the line-haul rate included the unloading at New York and Philadelphia. The District Court failed to recognize that the Commission found only that *for the future* the line-haul rate would not include delivery. The Commission stated:

> "Under their proposal [*i.e.*, the carriers' proposal in 1947 to impose an additional charge for unloading] the line-haul rate will apply only to the New York piers, with an additional

> charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery" (286 I.C.C. 119, 123).
>
> * * * * *
>
> "Respondents' proposal would * * * tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, for making delivery at New York piers" (286 I.C.C. 119, 129).

Assuming, *arguendo,* that *for the future* the carriers can establish a line-haul rate which does not include delivery, and that the carriers can establish in their tariffs an additional charge "for making delivery" (286 I.C.C. 119, 129), the vital fact is that they have not done so in the past. The prior line-haul rates included delivery, *i.e.,* unloading at New York and Philadelphia, and, therefore, it is impossible to determine whether an additional charge for delivery is reasonable without considering the entire line-haul rates.

The appellants are confident that the evidence will show that the carriers are being adequately compensated under their line-haul rates to New York and Philadelphia for the entire transportation service rendered, including delivery. The carriers have not produced any evidence with respect to a consideration of their entire line-haul rates. "At any hearing involving a change in a

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rate, fare, charge, or classification, or in a rule, regulation, or practice, * * * the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *" (49 U.S.C. § 15(7)).

The District Court also erred in failing to set aside the Commission's orders under sections 2 and 3(1) of the Act (49 U.S.C. §§ 2, 3(1)). Under these sections, it is unlawful for a carrier to subject any traffic to an undue or unreasonable prejudice or disadvantage or to unjustly discriminate against any kind of traffic by charging a greater rate for any service rendered than it charges for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The carriers unload all freight at the New York piers, other than fruits and vegetables, without any charge other than the line-haul rate. Perishable agricultural commodities, *e.g.*, butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk are included in the products unloaded under the line-haul rates. This is manifestly an unjust discrimination and an undue and unreasonable prejudice or disadvantage in violation of sections 2 and 3(1) of the Act.

CONCLUSION

The unloading charges challenged in this proceeding, if permitted to remain in effect, will seriously disrupt the marketing of fruits and vegetables at New York and Philadelphia and will

cause irreparable damage to the marketing enterprise at these cities. The unloading charges are invalid, and we believe that the questions presented by this appeal are substantial and are of public importance.

Respectfully submitted.

KARL D. LOOS,
Solicitor,
NEIL BROOKS,
Associate Solicitor,
DONALD A. CAMPBELL,
Counsel for the Secretary of Agriculture.

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY AND DR. P. PHILLIPS COOPERATIVE, PLAINTIFFS,

versus

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

FINAL JUDGMENT

The above styled cause having been submitted as on final hearing, and the Court having heard the parties, after due notice, it is upon consideration of the record and arguments:

ORDERED AND ADJUDGED:

1. The relief sought by plaintiffs is denied, and the complaint is dismissed at the cost of plaintiffs.

DONE AND ORDERED, August 31, 1953.

LOUIE W. STRUM,
U. S. Circuit Judge.
WILLIAM J. BARKER,
U. S. District Judge.
DOZIER A. DEVANE,
U. S. District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY, AND DR. P. PHILLIPS COOPERATIVE, PLAINTIFFS,

versus

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

Suit to enjoin and set aside orders of Interstate Commerce Commission.

(August 31, 1953)

Before STRUM, Circuit Judge, and BARKER and DEVANE, District Judges.

STRUM, Circuit Judge:

[1] The purpose of this suit is to set aside orders of the Interstate Commerce Commission relating to unloading charges on fresh fruits and vetgetables at New York and Philadelphia, entered pursuant to the Commission's report on re-hearing, dated May 7, 1952, 286 I.C.C. 119. See also 272 I.C.C. 648.

Plaintiffs are shippers of said commodities, and others interested in the marketing thereof. The

Note 1. Order dated May 7, 1952, in Investigation & Suspension Docket No. 5500; and orders dated December 15, 1952, in Florida Citrus Commission v. B. & O. R.R. Co., Docket Nos. 31105 and 31106.

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Secretary of Agriculture of the United States intervened, as did also many marketing, transportation and terminal organizations, and public Commissions. The cause is submitted as on final hearing.

Substantially all carload shipment of fresh fruits and vegetables destined to New York City from the South and West are brought to the Jersey side of the Hudson River, and the freight cars, with their cargoes intact, are then ferried across the river on car floats. There are two methods of delivery on the New York side. One is to switch the railroad cars from the car floats to team tracks located on land in lower Manhattan, where the consignees unload the railroad cars and place the cargo directly onto trucks. There is no separate charge for these deliveries.

By the other method, with which we are here concerned, the railroad cars are not switched to land tracks, but remain on the car floats which are placed alongside unloading piers where the carriers unload the cars, placing the contents on the floor of the pier station, where they are picked up by the consignees. The consignees are not allowed to unload the freight cars themselves, as they do on the team tracks, as it is physically impossible to place the consignee's trucks alongside the car floats. The carriers therefore unload the cars, the consignees having access to shipments only after they have been unloaded and placed on the floor of the pier stations. Approximately 75% of the total traffic is handled in this manner, as the team tracks can accommodate only about 25% of the traffic, and it is not feasible to expand them.

For this unloading service the railroads, since November 1, 1948, have been authorized to make additional charges, over and above the line haul rates at designated pier stations in Manhattan, first those proposed by the railroads and approved by the Commission, October 4, 1948, effective November 1, 1948, 272 I.C.C. 648, and later the lower rates approved by the Commission, May 7, 1952, 286 I.C.C. 119, here under attack. No delivery charges are imposed for other types of commodities unloaded at the pier station in like manner as fresh fruits and vegetables. Prior to November 1, 1948, the carriers also unloaded fresh fruits and vegetables at pier stations without additional charges.

In Philadelphia, unloading operations are generally similar to those at New York, except that no car floatage is now performed, and the team tracks are more adequate, but there are designated stations at which the carrier performs the unloading before the consignee has access to the goods.

When certain carriers proposed to establish separate unloading charges at pier stations, effective June 1, 1947, many shippers, including most of the plaintiffs here, protested. The Commission thereupon suspended operation of the schedules to December 31, 1947, and ordered an investigation to determine the lawfulness of the proposed charges. This proceeding is known as Investigation & Suspension Docket No. 5500, the final order in which, dated May 7, 1952, is one of the orders here under attack. See 286 I.C.C. 119.

Following a hearing before a Commission examiner, at which much evidence was presented by the carriers and opposing parties, and after oral

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argument and re-arguments, the Commission on October 4, 1948, issued its report in which it found that the proposed unloading charges were just and reasonable. 272 I.C.C. 648. The Commission thereupon vacated the Suspension order and authorized unloading charges of $1.95, $2.28 and $2.60 per net ton, effective November 1, 1948, on designated groups of said commodities at designated pier stations, in addition to the through line haul rates.

The Commission concluded that these additional charges for unloading service are in substantially the same category as those for switching, transit, refrigeration, and other specific services for which charges are authorized, and that the then expense of unloading was such that the carriers should no longer be required to furnish the service without compensation.

Upon the petitions of many protestants, the Commission thereafter reopened the proceedings for a rehearing. Extensive further evidence was taken by two Commission examiners, who recommended that the charges be held unlawful, but the Commission overruled these recommendations, and entered its final report on May 7, 1952, in which it held that unloading costs should be borne in part by shippers and in part by the carriers, and that not exceeding $1.05, $1.35 and $1.65 per ton would be reasonable charges to be paid by shippers. The Commission thereupon cancelled the existing higher charges, "without prejudice to the establishment of charges in conformity with the views ex-

pressed" in the report on May 7, 1952. The charges thus approved represented only a portion of the actual unloading costs.

On September 22, 1952, certain shippers again attacked the unloading charges approved on May 7, 1952, Docket No. 31105 referring to New York and Docket No. 31106 referring to Philadelphia, asserting that the charges were unjust and unreasonable, enabling the carriers to make two charges for a single service. The Commission dismissed these proceedings by its order of December 15, 1952, which is also here under attack, holding that these petitions assailed the order on substantially the same grounds previously considered and overruled on May 7, 1952 in I. & S. Docket No. 5500.

In this action, brought pursuant to 28 U.S.C.A. 1336, 1337, 1398, 2284 and 2321-25, plaintiffs seek to enjoin and set aside the orders above mentioned. They contend that the line haul rate includes delivery to the consignee at destination, that no additional charge for unloading is justified when no additional service is rendered, and that none is rendered here. Plaintiffs further contend that in authorizing these charges, the Commission acted arbitrarily, unreasonably, unlawfully and contrary to the evidence; that the Commission could not consistently approve the additional unloading charges without first examining the line haul rates as to their adequacy to cover the unloading charges; that plaintiffs were denied an opportunity to be heard as to the justification for and reasonableness of the unloading charges of $1.05, $1.35 and $1.65,

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which were finally allowed; and that the Commission failed to give effect to sec. 15(7) of the Interstate Commerce Act, which places the burden of proof in these matters upon the carriers.

The fact finding and policy making authority in these matters is the Interstate Commerce Commission, in whom Congress has reposed the duty and authority to determine whether charges of this character are appropriate, reasonable, and just. *Arizona Grocery Co.* v. *A.T. & S.F.R. Co.*, 284 U.S. 370 76 L. Ed. 348; *Penn. R. Co.* v. *International Coal Mining Co.*, 230 U.S 184, 196, 57 L. Ed. 1446, 1451; *Mississippi Valley Barge Co.* v. *United States*, 292 U.S. 282, 78 L. Ed. 1260. It is not our function to review the Commission for mere error, nor are we authorized to reverse its findings even though, as original finders of fact, we might have reached a different conclusion on the evidence. It is for us to consider and decide only whether the Commission has acted within its statutory authority, has proceeded in accordance with the essential requirements of due process, has acted upon adequate findings, and whether in the record considered as a whole there is substantial evidence to support those findings. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 139, 83 L. Ed. 1147, 1157; *I.C.C.* v. *Inland Waterways* Corp. 319 U.S. 671, 691, 87 L. Ed. 1655, 1668; *I.C.C.* v. *Illinois Cent. R. Co.*, 215 U.S. 452, 470, 54 L. Ed. 280, 288.

The point at which a carrier's line haul service begins or ends is a question of fact to be deter-

mined by the Commission, not by the courts. The commission's findings on that question will not be disturbed by the courts if supported by evidence. *United States* v. *Wabash R. Co.,* 321 U.S. 403, 408, 88 L. Ed. 827, 831; *I.C.C.* v. *Hoboken R. Co.,* 320 U.S. 368, 88 L Ed 107; *United States* v *American Tin Plate Co,* 301 U.S. 402, 81 L. Ed. 1186; *United States* v. *Pan Amer. Pet. Co.,* 304 U.S. 156, 82 L. Ed. 1262; *B.&O. R. Co.* v. *United States,* 305 U.S. 507, 525, 83 L. Ed. 318, 329; *Swift & Co* v. *United States,* 316 U.S. 216, 86 L. Ed. 1391; *A.T. & S.F.R. Co.* v. *United States,* 295 U.S. 193, 79 L. Ed. 1382; *Armour & Co.* v. *Alton R. Co,* 312 U.S. 195, 85 L. Ed. 771.

Whether a terminal service, such as this unloading operation, shall in the circumstances involved be treated as in addition to, or as a part of, the service covered by the line haul rate, is a question upon which the findings of the Commission are conclusive, if supported by substantial evidence. *Adams* v. *Mills,* 286 U.S., 397, 410, 76 L. Ed. 1184, 1193. In the last cited case, the additional charge was disapproved. Although the historical aspects of that case bear a noticeable resemblance to this, and the additional charges were there disallowed, those are circumstances to be resolved by the Commission. A prior existing custom of performing the additional service without charge is not controlling. *United States* v. *Smelting Co.,* 339 U.S. 186, 94 L. Ed. 750.

It is not essential that the Commission first review in detail the line haul rates before allowing

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the unloading charges under consideration. What the Commission is really deciding here is, not the adequacy or inadequacy of line haul rates to cover the unloading service, but where the carrier's line haul service ends, and whether unloading is a justifiable additional service, of value to the consignee, for which he should pay at least a part of the cost. As we have seen, determination of these matters is confided by Congress to the Commission, whose decision, if supported by substantial evidence, is conclusive on the courts, as these are discretionary administrative matters in a specialized field, recognized as such by Congress. While the Commission is not precluded from considering the through rate, it is not *required* to consider it in determining the reasonableness of a separately stated accessorial charge. *Barringer* v. *United States,* 319 U.S. 1, 87 L. Ed. 1171, where the Supreme Court said: "But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism."

The Commission has found that the level of line haul rates to New York and Philadelphia is no higher than the rates to other consumer points where shippers unload or where charges are assessed for unloading. It has also found that unloading is an additional service, wholly distinct

from delivery; that pier station unloading by the carrier in New York is essential, as the team tracks are inadequate, can not be enlarged, and there are no physical means by which the consignee's trucks may reach the car floats; that this method of unloading saves the payment of switching charges by the consignee, avoids traffic congestion, and facilitates deliveries; and that it is beneficial to consignees, for the additional reason that in taking delivery on the pier station floor, the consignee has the advantage of displaying the entire contents of a car to prospective buyers, and of using the pier station facilities as a sales place. Comparable benefits accrue at Philadelphia.

Based upon these findings, which are amply supported by evidence, the Commission found that the line haul service terminated when the cars reached the pier station, just as they found it terminated at the interchange yards in the Tin Plate and Pan American Petroleum cases, supra, in which the Supreme Court accepted the Commission's findings as conclusive. The evidence also supports the Commission in finding that unloading by the carrier is a desirable and justifiable accessorial service, of value to the consignee, and that he should pay a part of the costs, and that conditions have materially changed since the time when the carrier performed that service without charge.

Plaintiffs assert that they were not given an opportunity to be specifically heard upon the reasonableness of the reduced rates of $1.05, $1.35, and $1.65 per ton, and claim that they were thereby denied due process. But the Commission had just concluded, not one but two, exhaustive and compre-

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hensive investigations of the entire subject of unloading charges at these points, based upon the higher rates then in effect, during which plaintiffs, and others, were afforded a full opportunity to be heard upon all phases of the subject. As a result of these hearings, the Commission found the existing rates too high, but that the reduced rates above mentioned would be reasonable, and that the charge was justified as for an additional service.

Instead of merely setting aside the old rates, thus leaving the matter undetermined, the Commission brought the controversy to a close by setting the old rates aside "without prejudice to the establishment of charges in conformity with the views expressed herein," that is, in the Commission's report. The carriers then put the reduced rates into effect.

Having just completed a thorough investigation of the entire subject, during which plaintiffs were fully heard, it would have been a work of supererogation to conduct a further hearing upon these lower rates, the reasonableness of and justification for which was already shown by the evidence. It was clearly within the Commission's power not only to condemn the then existing rates as unreasonable, but at the same time and upon the evidence already taken to fix rates that would be just and reasonable. In this, there was no denial of due process to plaintiffs. Plaintiffs were fully heard upon the entire matter. The situation is the same in principle as where a plaintiff demands $1,000 of a defendant, the court finding that he is not entitled to $1,000 but that on the evidence he is entitled to $500, and awards that sum. In these circumstances the de-

fendant could not complain of a denial of due process because he was not again heard on his liability for $500. *Akron C. & Y. Ry. Co.* v. *United States,* 22 Fed. (2) 199, 203.

Nor does it appear to us that the Commission erroneously relieved the carriers of the burden of proof cast upon them in these matters by sec. 15(7) of the Interstate Commerce Act. The Commission's "notice" of October 10, 1950, that the "record is deficient" as to certain evidence, and assigning the case for further hearing as to the comparative cost of team track and platform delivery, merely extended the evidence into an additional field of inquiry. Nothing appears in this procedure which tends to shift the burden of proof to others than the carriers.

In disposing of this matter, the Commission has clearly acted within its statutory authority; its proceedings have been conducted consistently with due process; its findings are adequate and supported by substantial evidence. In these circumstances, the relief sought by plaintiffs must be denied, and the complaint dismissed at the cost of plaintiffs.

Dismissed.

LOUIE W. STRUM,
U. S. Circuit Judge.
WILLIAM J. BARKER,
U. S. District Judge.
DOZIER A. DEVANE,
U. S. District Judge.

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UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA,
ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY, AND DR. P. PHILLIPS COOPERATIVE, PLAINTIFFS,

versus

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

DEVANE, DISTRICT JUDGE, Dissenting:

The record in this case discloses it is the desire of the carriers affected to have the same unloading practices in effect at Philadelphia that are in effect at New York, and I will, therefore, confine this dissent to the situation at New York.

In my opinion the majority enlarges the authority of the Interstate Commerce Commission over specific freight rates to unprecedented and unauthorized limits. The Court in effect holds our review of the order of the Commission in this case is limited to the mere matter of due process; i.e., notice and hearing. In reaching this conclusion the court brushes aside the following undisputed factual questions which, in my opinion, are controlling of the case:

1. Unloading at New York was originally inaugurated by the carriers concerned for their own convenience and benefit.

2. It is now and always has been the most economical way the carriers may make deliveries of freight at New York.

3. The line-haul rates were originally established to include and have always included compensation for unloading costs at New York. The Interstate Commerce Commission has so held in numerous cases.

4. When the unloading charges were made effective by the Interstate Commerce Commission the line-haul rates were then, and are now, in excess of just and reasonable rates based upon the cost of transporting and unloading fruits and vegetables at New York.

The first three points stated above are so thoroughly covered and completely presented by the report on rehearing proposed by Russell M. Brown and J. M. Walsh, Interstate Commerce Commission Examiners, and in the second report on further rehearing proposed by J. M. Walsh, Examiner, (Exhibits H and I to the complaint) that the Court considers it quite unnecessary to enlarge upon what the Examiners say on these points in the two reports. They concluded in each report that the carriers failed to meet the burden of proof that the assailed charges were just and reasonable, and therefore failed to meet the requirements of Section 15(7) of the Interstate Commerce Commission Act. Having reached this decision, they concluded in the first report that it was unnecessary to consider whether there was also a violation of Sections 2 and 3 of the Act. In the second report Examiner Walsh also found and held that the

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proposed unloading charges were in violation of Section 3(1) of the Act.

In my opinion, the carriers not only failed to meet the requirements of Section 15(7) of the Act, but the evidence in the case also clearly establishes a violation of Section 2 and 3(1) of the Act. Unloading is performed by the carriers of almost all perishable freight consigned to New York. The unloading charges are made applicable only to fruits and vegetables, while other similar perishable products such as butter, butter solids, cheese, eggs, dressed poultry, fresh meat, fish, oysters and raw milk, are unloaded by the carrier without the imposition of any unloading charges. This, in my opinion, constitutes a clear violation of Sections 2 and 3(1) of the Act.

The fourth point enumerated above was not considered by the examiners or the Interstate Commerce Commission when this case was before the Commission. The examiners merely held that under Section 15(7) of the Act, the obligation rested upon the carriers to show the reasonableness of the line-haul rates and it was because of the carriers' failure to meet this burden that they recommended the proposed unloading charges be cancelled. The Interstate Commerce Commission simply brushed aside the question of the reasonableness of the line-haul rates and decided the case solely on the reasonableness of the unloading charges.

At the time the Commission had this case under consideration it also had under consideration a general application for an increase in freight rates (interstate and intrastate) throughout the United States to meet rising costs and diminishing passen-

ger revenue. As a result of the application for this general increase the Commission allowed a thirty percent (30%) increase in freight rates, chiefly to make up for passenger operating deficits. 264 I.C.C. 695; 266 I.C.C. 537; 269 I.C.C. 33; 270 I.C.C. 81, 93, 403. The legality of this action on the part of the Commission was challenged in *King, et al.* v. *United States of America, et al.*, 344 U.S. 254. On the record in that case the carriers frankly conceded that the railroads of this country by and large are making a substantial profit out of their overall freight service, and that considered alone, increases in freight rates could not have been justified in that case on the ground that the railroads needed the additional revenue to pay the cost of rendering freight services and a fair return on the property devoted to such services. The difference between that case and this case is of grave importance as to the power of the Interstate Commerce Commission over freight rates. In the former case there was a general increase made in freight rates to cover the heavy losses resulting from passenger operations. Congress having authorized such action and the Interstate Commerce Commission having taken such action, the Court did not have the authority to override the same. In this case, however, the carriers have limited their efforts to secure increases in rates to a small segment of freight transportation and the Commission by its order has cast a burden upon this small segment of transportation that is not placed upon any other commodities. To hold that the Interstate Commerce Commission has the authority under the Interstate Commerce Act to so discriminate

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against fruits and vegetables or any other classes of commodities is to vest in the Commission authority not to be found in the Interstate Commerce Act. The decision in *King* v. *United States*, supra, is so far reaching in its effect upon freight rates that a grave duty rests upon the Courts to restrict the carriers and the Commission to the principles announced in that case and where, as in this case, it appears that the line-haul rates are in excess of just and reasonable rates additional accessural charges limited to particular classes of freight should not be countenanced.

Assuming the carriers are entitled to additional compensation for the cost of unloading freight at New York and Philadelphia, their remedy, under the Interstate Commerce Act, is to secure it by agreement with connecting carriers affected or make application to the Commission for a greater division of the line-haul rates to cover the needed additional costs instead of loading such costs on the farmers of this country.

In my opinion, the order of the Commission of May 7, 1952, 286 ICC 119, clearly violates Sections 2, 3(1) and 15(7) of the Interstate Commerce Act and, for this reason, is illegal and should be set aside.

——— ———,
District Judge.

APPENDIX B

The following are the relevant provisions of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088-1089):

"SEC. 202. The Congress hereby declares that a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation. It is further declared to be the policy of Congress to promote through research, study, experimentation, and through cooperation among Federal and State agencies, farm organizations and private industry a scientific approach to the problems of marketing, transportation, and distribution of agricultural products similar to the scientific methods which have been utilized so successfully during the past eighty-four years in connection with the production of agricultural products so that such products capable of being produced in abundance may be marketed in an orderly manner and efficiently distributed. In order to attain these objectives, it is the intent of Congress to provide for (1) continuous research to improve the marketing, handling, storage, processing, transportation, and distribution of agricultural products; (2) cooperation among Federal and State agencies, producers, industry organizations, and others in the development and effectuation of research and market-

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ing programs to improve the distribution processes; (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed, that dietary and nutritional standards may be improved, that new and wider markets for American agricultural products may be developed, both in the United States and in other countries, with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner. In effectuating the purposes of this title, maximum use shall be made of existing research facilities owned or controlled by the Federal Government or by State agricultural experiment stations and of the facilities of the Federal and State extension services. To the maximum extent practical marketing research work done hereunder in cooperation with the States shall be done in cooperation with the State agricultural experiment stations; marketing educational and demonstrational work done hereunder in cooperation with the States shall be done in cooperation with the State Agricultural extension service; market information, inspection, regulatory work and other marketing service done hereunder in cooperation with the State

agencies shall be done in cooperation with the State departments of agriculture, and State bureaus and departments of markets" (7 U.S.C. § 1621).

"SEC. 203. The Secretary of Agriculture is directed and authorized:

* * * * *

(j) To assist in improving transportation services and facilities and in obtaining equitable and reasonable transportation rates and services and adequate transportation facilities for agricultural products and farm supplies by making complaint or petition to the Interstate Commerce Commission, the Maritime Commission, the Civil Aeronautics Board, or other Federal or State transportation regulatory body with respect to rates, charges, tariffs, practices, and services, or by working directly with individual carriers or groups of carriers" (7 U.S.C. § 1622(j)).

The following are the relevant provisions of the Agricultural Adjustment Act of 1938 (52 Stat. 31, 36):

"SEC. 201. (a) The Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges,

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tariffs, and practices relating to the transportation of farm products, the Commission shall cause the Secretary to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard" (7 U.S.C. § 1291 (a)).

"(b) If such rate, charge, tariff, or practice complained of is one affecting the public interest, upon application by the Secretary, the Commission shall make the Secretary a party to the proceeding. In such case the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. The liability of the Secretary in any such case shall extend only to liability for court costs" (7 U.S.C. § 1291 (b)).

The following are the relevant provisions of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U.S.C. § 1 *et seq.*):

NATIONAL TRANSPORTATION POLICY

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establish-

ment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy" (49 U.S.C. preceding § 1).

* * * * *

SEC. 1(3) (a). "* * * The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *" (49 U.S.C. § 1(3) (a)).

SEC. 1(5) "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and rea-

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sonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful" (49 U.S.C. Supp. V § 1(5)).

"SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful" (49 U.S.C. § 2).

"SEC. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any

respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description" (49 U.S.C. § 3 (1)).

SEC. 6 (7) "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs (49 U.S.C. § 6 (7)).

SEC. 15 (6) "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between

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the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than an-

other carrier of the joint rate, fare or charge" (49 U.S.C. § 15 (6)).

SEC. 15 (7) "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension,

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the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible" (49 U.S.C. § 15 (7)).

SEC. 15a(2) "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in

the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service" (49 U.S.C. § 15a(2)).

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